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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 BOB ROGERS,

12 Plaintiff,

13 v.

14 ROBERT NELSON et al.,

15 Defendants.  
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Case No.: 16cv955-L(RBB)

**ORDER GRANTING DEFENDANTS'  
MOTION TO COMPEL  
ARBITRATION**

17 Pending before the Court in this breach of fiduciary duty action is Defendants'  
18 motion to compel arbitration and stay this action. Plaintiff filed an opposition, and  
19 Defendants replied. The Court decides this matter on the briefs without oral argument.  
20 *See* Civ. L. R. 7.1(d.1). For the reasons stated below, Defendants' motion is granted.

21 According to the allegations in the complaint, Plaintiff Bob Rogers is an  
22 entrepreneur who built and sold businesses. He is the trustee of the family trust  
23 established to invest the proceeds. Starting in 2007, the funds were managed by  
24 Defendant Robert Nelson, a Private Wealth Advisor at the Private Wealth Management  
25 division of Defendant Morgan Stanley Smith Barney LLC ("Morgan Stanley"). The trust  
26 funds were invested in traditional stocks, bonds and mutual funds.

27 In March 2015, Plaintiff sold one of his companies and deposited the proceeds  
28 with Defendants on behalf of the trust. Shortly thereafter, without prior notice, without

1 disclosures regarding the nature of the investment and its associated fees and risk, and  
2 contrary to explicit instruction to not make investments without prior consent, on July 31,  
3 2015, Defendants invested \$ 1 million of trust funds in a Morgan Stanley hedge fund,  
4 which resulted in substantial tax liabilities and low returns for the trust, while generating  
5 disproportionately large fees and commissions for Defendants. When Plaintiff found out  
6 about the unauthorized investment, he requested immediate return of the funds, but was  
7 told he could not receive any funds until May 2016 at the earliest, that a full refund could  
8 not be obtained until 2017.

9 In his capacity as the trustee, Plaintiff filed this action in State Court alleging  
10 breach of fiduciary duty and other tort claims. Defendants removed the action to this  
11 Court. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332.

12 Defendants filed the pending motion to compel arbitration, arguing that Plaintiff  
13 agreed to arbitration when he signed various investment management and account  
14 agreements in March and June 2015. Plaintiff opposes, arguing that the documents he  
15 signed in March 2015 were not signed on behalf of the trust, and that the June 2015  
16 documents, which were signed on behalf of the trust, did not include the arbitration  
17 clause, or alternatively, that the arbitration clause is unconscionable under California law.

18 Arbitration clauses are governed by the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*  
19 ("FAA") and California contract law. "The FAA mandates that district courts *shall* direct  
20 the parties to proceed to arbitration on issues as to which an arbitration agreement has  
21 been signed." *Kilgore v. KeyBank N.A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (emphasis  
22 in original), quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). "As  
23 federal substantive law, the FAA preempts contrary state law." *Mortensen v. Bresnan*  
24 *Comm'cns, LLC*, 722 F.3d 1151, 1158 (9th Cir. 2013). However, the FAA does not  
25 require enforcement of arbitration agreements that may be invalidated on "such grounds  
26 as exist at law or in equity for the revocation any contract." 9 U.S.C. §2. "This saving  
27 clause permits agreements to arbitrate to be invalidated by generally applicable contract  
28 defenses, such as fraud, duress, or unconscionability ... ." *AT&T Mobility LLC v.*

1 *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citation omitted).  
2 The burden of proving that the arbitration agreement cannot be enforced is on the party  
3 resisting arbitration. *Green Tree Fin. Corp. - Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

4 The Court first turns to Plaintiff's argument that he did not enter into an arbitration  
5 agreement. Plaintiff does not deny that in his individual capacity he signed the "Single  
6 Advisory Contract" with Morgan Stanley on March 14, 2015. (Defs' Ex. A at 12; *see*  
7 Decl. of Bob Rogers ("Rogers Decl.") at 2; Opp'n at 9-10.) Directly over his signature is  
8 a bolded paragraph stating,

9 This Agreement contains a predispute arbitration clause (in  
10 Section 8 on page 9) under which you agree to arbitrate any  
11 disputes with us ... .

12 (Defs' Ex. A at 12.) The referenced arbitration clause, set out in bold print, provides in  
13 pertinent part:

14 8. Arbitration

15 This Agreement contains a predispute arbitration clause. By  
16 signing an arbitration agreement the parties agree as follows:

- 17 • All parties to this Agreement are giving up their right to sue  
18 each other in court, including the right to a trial by jury,  
19 except as provided by the rules of the arbitration forum in  
20 which a claim is filed.

21 [¶] . . . You agree that all claims or controversies, whether such  
22 claims or controversies arose prior, on or subsequent to the date  
23 hereof, between you and MSSB and/or any of its present or  
24 former ... employees concerning or arising from (i) any account  
25 maintained with MSSB individually or jointly with others in  
26 any capacity; (ii) any transaction involving MSSB ... any you,  
27 whether or not such transaction occurred in such account or  
28 accounts; or (iii) the construction, performance or breach of this  
or any other agreement between you and us, and any duty  
arising from the business of MSSB or otherwise, shall be  
determined by arbitration ... .

1 (*Id.* at 9.) At the end of the clause, a paragraph set out in all capital letters further states,  
2 "PLEASE NOTE THAT A COPY OF THIS ARBITRATION PROVISION IS  
3 CONTAINED IN EACH PROGRAM AGREEMENT ... ." (*Id.* at 10.)

4 Plaintiff argues that the arbitration clause does not apply because he did not sign  
5 the agreement in his capacity as the trustee. The arbitration clause provides that it applies  
6 to future disputes and future Morgan Stanley accounts Plaintiff opens in "any capacity."  
7 (*Id.* at 9.) Plaintiff cites no authority and provides no argument to show why this  
8 unambiguous express contractual language should not apply. (*See* Opp'n at 9-10.)  
9 Accordingly, the Court finds that the arbitration clause in the Single Advisory Contract  
10 dated March 14, 2015 (Defs' Ex. A at 9), applies to Plaintiff's pending action.

11 Alternatively, on June 26, 2015, in his capacity as the trustee, Plaintiff signed the  
12 Account Application and Client Agreement for Trust Accounts. (Pl.'s Ex. B  
13 ("Application") at 7.)<sup>1</sup> In a bolded and bordered paragraph immediately above his  
14 signature, the Application provides:

15 Your Accounts at MSSB are governed by a predispute  
16 arbitration clause (starting on page 9, paragraph 15 of the  
17 attached Client Agreement). You acknowledge that you have  
18 received a copy of the Client Agreement, including the  
predispute arbitration clause.

19 (*Id.*) The referenced Client Agreement includes a nearly identical<sup>2</sup> arbitration clause as  
20 the Single Advisory Contract Plaintiff signed in March. (Defs' Ex. C, Client Agreement  
21 at 9.)

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24 <sup>1</sup> The document is titled Account Application and Client Agreement for Trust  
25 Accounts, nevertheless, it consists of two separately paginated documents -- an 8-page  
26 application and a 10-page client agreement. (Defs' Ex. C.)

27 <sup>2</sup> Although the arbitration clauses referenced in this order are not identical, the minor  
28 differences are irrelevant to the issues presented. (*See* Mot. at 4 & n.1; *id.* at 13  
(highlighting differences).)

1 Plaintiff argues that the arbitration clause in the Client Agreement does not apply  
2 because he did not receive the Client Agreement. (Rogers Decl. at 3.) He does not  
3 explain why he acknowledged twice that he did. First, immediately following  
4 instructions, the Application states in pertinent part:

5 Important Information about your Application

6 To open and maintain your account(s), each Trustee must  
7 acknowledge receipt of and agree to the terms and conditions of  
8 the ... Client Agreement ... .

9 (Pl.'s Ex. B at 1.) Second, Plaintiff's signature on the Application appears immediately  
10 below a bolded and bordered paragraph acknowledging his receipt of the Client  
11 Agreement and pointing out the arbitration clause. The email accompanying the  
12 Application invited Plaintiff to contact Nelson if there were any questions. (Pl.'s Ex. A at  
13 1.) Plaintiff does not contend he had any questions, that he contacted Rogers to deny his  
14 agreement to arbitration, or that he complained that the Client Agreement was missing.  
15 (See Rogers Decl. at 3; Pl.'s Ex. B, Plaintiff's June 26, 2015 email at 1.)

16 Finally, on July 30, 2015, Morgan Stanley sent a letter to Plaintiff in his capacity  
17 as the trustee. The letter stated in pertinent part:

18 Re: Alternative Investments Advisory Account Confirmation  
19 PLEASE REVIEW

20 We are pleased to welcome you to our Alternative Investments  
21 Advisory programs. . . . [¶] Please take a moment to review  
22 the enclosed materials. If any information is inaccurate, please  
23 notify your Private Wealth Advisor. These documents are for  
your records - there is no need to sign or return them.

24 (Defs' Ex. D, cover letter at 1 (emphasis in original).) Plaintiff does not deny opening the  
25 alternative investments advisory account, or receiving the letter with its enclosed  
26 materials. (See Rogers Decl. at 2-3.) Enclosed with the letter was a Single Advisory  
27  
28

1 Contract, which contains the same arbitration clause<sup>3</sup> as the Single Advisory Contract  
2 from March, and the Client Agreement from June. (Cf. Defs' Ex. D, Single Advisory  
3 Contract at 13; Defs' Ex. C, Client Agreement at 9-10; & Defs' Ex. A at 9.) Plaintiff did  
4 not contact Nelson, as directed in the letter, to protest the arbitration clause included in  
5 the new Single Advisory Contract. (See Rogers Decl. at 2-3.)

6 Instead, Plaintiff argues he was overwhelmed by the quantity of the "boilerplate"  
7 paperwork associated with his accounts, he claims that the June email accompanying the  
8 Account Application and Client Agreement for Trust Accounts only pointed him to the  
9 signature page of the Application, and that he simply did not receive or notice any  
10 document with an arbitration clause. (Rogers Decl. at 2-3.) The argument implies that  
11 Plaintiff did not read the documents he received in connection with his accounts. This is  
12 not sufficient to avoid arbitration. Where a client similarly argued that he did not see the  
13 arbitration clause due to the large quantity of investment account boilerplate paperwork,  
14 the court rejected the argument, finding that "[r]easonable diligence requires the reading  
15 of a contract before signing it. A party cannot use his own lack of diligence to avoid an  
16 arbitration agreement." *Rowland v. PaineWebber Inc.*, 4 Cal. App. 4th 279, 286 (1992),  
17 disagreed with on other grounds by *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th  
18 394, 415-16 (1996).

19 For the foregoing reasons, the Court finds, alternatively, that the arbitration clauses  
20 contained in the Client Agreement, which was included with the Account Application  
21 and Client Agreement for Trust Accounts sent to Plaintiff on June 25, 2015 (Defs' Ex. C,  
22 Client Agreement at 9), and in the Single Advisory Contract sent to Plaintiff on July 30,  
23 2015 (Defs' Ex. D, Single Advisory Contract at 13), apply to Plaintiff's pending action.<sup>4</sup>

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26 <sup>3</sup> See footnote 2 above.

27 <sup>4</sup> Because the arbitration clause is set forth fully in both of these documents, the  
28 Court need not address Plaintiff's argument regarding incorporation by reference.

1 Plaintiff further contends that the arbitration clause should not be enforced because  
2 it is unconscionable under California law. To prevail, Plaintiff must show that the  
3 arbitration clause is both procedurally and substantively unconscionable. *See Armendariz*  
4 *v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 (2000). The procedural  
5 element focuses on "oppression or surprise due to unequal bargaining power," and the  
6 substantive element focuses on "overly harsh and one-sided results." *Id.* A sliding scale  
7 is applied, so that the more substantively oppressive the contract term, the less evidence  
8 of procedural unconscionability is required to find it unenforceable and vice versa. *Id.*

9 Plaintiff first argues that the arbitration clause is procedurally unconscionable  
10 based on surprise. He maintains he was surprised when Defendants brought the  
11 arbitration clause to his attention, because it was buried in small print boilerplate and not  
12 delivered to him in his capacity as the trustee.

13 "Surprise is defined as the extent to which the supposedly agreed-upon terms of the  
14 bargain are hidden in the prolix printed form drafted by the party seeking to enforce the  
15 disputed terms." *Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 579 (2008). As  
16 discussed above, the arbitration clause stood out in Defendants' documents with the use  
17 of bold print. In addition, the notice of arbitration clause, also in bold print, was set out  
18 immediately above Plaintiff's signature on the Single Advisory Contract he signed in  
19 March 2015 and Application he signed in June 2015. A notice that each program  
20 agreement contains a copy of the arbitration clause was set out in all capital letters at the  
21 end of the arbitration clause in the Single Advisory Contract from March 2015.

22 Plaintiff's argument that he did not receive an agreement with the arbitration clause is  
23 rejected for the previously discussed reasons -- he had signed an agreement with the  
24 arbitration clause and a notice that the arbitration clause was included. Although he did  
25 not sign it in his capacity as the trustee, the arbitration clause unambiguously states that it  
26 applies to future accounts Plaintiff opens in any capacity. Subsequently, in his capacity  
27 as trustee, Plaintiff received two documents, each with a notice of arbitration clause. At  
28 least one of the documents was an agreement which included the entire arbitration clause.

1 Plaintiff was twice invited to contact Nelson with questions or to point out any  
2 inaccuracies, but did not. Plaintiff's surprise argument is therefore unpersuasive.

3       Procedural unconscionability can alternatively be based on a showing of  
4 oppression. *Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 821, 824  
5 (2010). "Oppression arises from inequality in bargaining power that results in no real  
6 negotiation and an absence of meaningful choice." *Gatton*, 152 Cal. App. 4th at 821.  
7 This often takes the form of a contract of adhesion -- a standardized contract drafted by  
8 the party of superior bargaining strength and imposed on the other, without an  
9 opportunity to negotiate the terms. *See Shroyer v. New Cingular Wireless Servs., Inc.*,  
10 498 F.3d 976, 981 (9th Cir. 2007); *see also Gatton*, 152 Cal. App. 3d 582 ("adhesion  
11 pertains to the oppression aspect of procedural unconscionability").

12       In furtherance of his argument, Plaintiff also contends he is a consumer. This is  
13 contrary to his allegations in the complaint and representations in his declaration.  
14 Plaintiff is a businessman, who "over the past 20 plus years ... start[ed], buil[t], and  
15 gr[e]w several successful businesses in California that employed many Californians" and  
16 "was able to create wealth for his family" through his efforts. (Compl. at 1-2.) He  
17 became a Morgan Stanley investor in 2007 -- several years before the June 2015  
18 transaction which prompted this lawsuit. (*Id.* at 4; Rogers Decl. at 2.) In 2015, Plaintiff's  
19 investment with Morgan Stanley exceeded \$ 1 million. (*See* Compl. at 5.) Plaintiff is  
20 therefore not merely a consumer, but a sophisticated investor.

21       Although Plaintiff is a sophisticated investor, Morgan Stanley, the drafter, had  
22 superior bargaining strength. Further, it appears that the terms of Plaintiff's agreements  
23 were not open to negotiation. In this regard, the arbitration clause is included in a  
24 contract of adhesion. "[A]bsent unusual circumstances, the use of a contract of adhesion  
25 establishes a minimal degree of procedural unconscionability ... ." *Gatton*, 152 Cal. App.  
26 4th 585, 586 n.9. However, Plaintiff had other options than investing his wealth with  
27 Morgan Stanley. Although other market choices do not eliminate the oppression aspect  
28 of procedural unconscionability, they diminish it to some extent. *Id.* at 583. The Court



1 therefore finds that Plaintiff has shown a minimum amount of procedural  
2 unconscionability.

3 To avoid the arbitration clause, Plaintiff must also show substantive  
4 unconscionability. Substantive unconscionability focuses on whether the results of the  
5 contract term are overly harsh or one-sided. *Armendariz*, 24 Cal.4th at 114. Plaintiff  
6 complains that the arbitration clause forces him to litigate in an unknown forum  
7 potentially in an unknown location, under unknown rules and time limits, subject to  
8 "exorbitant" administrative fees, with only a limited right to discovery, and in front of  
9 arbitrators friendly to Morgan Stanley. (Opp'n at 15-16.)

10 Plaintiff's complaints are largely contradicted by the arbitration clause itself. (*See*  
11 Defs' Ex. A at 9.) For example, the majority of the panel cannot be composed of industry  
12 insiders. (*Id.* ("The panel of arbitrators may include a *minority* of arbitrators who were or  
13 are affiliated with the securities industry.") (Emphasis added).) Plaintiff chooses the  
14 arbitration forum from "any self-regulatory organization or exchange of which [Morgan  
15 Stanley] is a member." (*Id.*) Plaintiff therefore has a substantial say in the choice of the  
16 applicable rules, forum and location. For example, the rules and fees for arbitration  
17 before the Financial Industry Regulatory Authority ("FINRA") are posted on its website,  
18 [www.finra.org](http://www.finra.org). They provide, among other things, for "hearing location closest to the  
19 customer's residence at the time of the events giving rise to the dispute" (Defs' Ex. F  
20 (FINRA Rule 12213(a)(1)), discovery ([www.finra.org/arbitration-and-mediation/](http://www.finra.org/arbitration-and-mediation/)  
21 [arbitration-rules](http://www.finra.org/arbitration-and-mediation/) (FINRA Rules 12505-12514), motion practice (*id.* Rules 12503-04), and  
22 other procedural matters (*see generally id.* Rules 12000-12905). FINRA conducts  
23 hearings in San Diego. ([www.finra.org/arbitration-and-mediation/dispute-resolution-](http://www.finra.org/arbitration-and-mediation/dispute-resolution-regional-offices-and-hearing-locations.)  
24 [regional-offices-and-hearing-locations.](http://www.finra.org/arbitration-and-mediation/dispute-resolution-regional-offices-and-hearing-locations.)) Contrary to Plaintiff's contention that the statute  
25 of limitations is unknown, the arbitration clause states that, "The statute of limitations ...  
26 shall be that which would be applied by the courts in the state where the [Morgan  
27 Stanley] office servicing your Account is located." (Defs' Ex. A at 9.)  
28

1 Plaintiff expressly complains that arbitration will "limit Mr. Rogers' s ability to  
2 engage in meaningful discovery." (Opp'n at 15.) If Plaintiff chooses arbitration with  
3 FINRA, its rules expressly provide for discovery. (www.finra.org/arbitration-and-  
4 mediation/arbitration-rules (FINRA Rules 12505-12514).) To the extent his contention is  
5 that discovery tends to be less extensive in arbitration than litigation, it is not an  
6 appropriate consideration. "A prime objective of an agreement to arbitrate is to achieve  
7 streamlined proceedings and expeditious results." *Concepcion*, 563 U.S. at 346 (internal  
8 quotation marks and citations omitted); *see also id.* at 345 & 349. "[A] court may not  
9 rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that  
10 enforcement would be unconscionable ... ." *Id.* at 341 (internal quotation marks and  
11 citation omitted). Limitation on the scope of discovery, which is inherent in the less  
12 formal and more expeditious nature of arbitration, is, without more, not a proper basis to  
13 refuse to enforcement. *See id.* at 341-42.

14 Finally, all terms of the arbitration clause apply equally to both parties. (*See* Defs'  
15 Ex. A at 9.) Accordingly, the arbitration clause is not substantively unconscionable. In  
16 the absence of a showing of substantive unconscionability, the arbitration clause is  
17 enforceable.

18 Defendants' motion to compel arbitration is granted. This action is stayed pending  
19 arbitration pursuant to 9 U.S.C. §3. The Clerk shall administratively close the case. The  
20 parties may reopen it by following the procedure set forth in the 9 U.S.C. §9 *et seq.*

21 **IT IS SO ORDERED.**

22  
23 Dated: May 1, 2017

24   
25 Hon. M. James Lorenz  
26 United States District Judge  
27  
28